Utah, 312, 333; *The San Rafael* (1905) 72 C. C. A. 388, 397; *Commonwealth v. Howard* (1910) 205 Mass. 128, 152; *Ickes v. Ickes* (1912) 237 Pa. St. 582, 590. Remote declarations may be excluded where the court considers time the test of admissibility. *Hale v. Life Indem. & Inv. Co.* (1896) 65 Minn. 548, 550. Some courts, however, receive even very remote declarations, ruling that age goes to the weight of such evidence and not to its admissibility. *Blackburn v. State* (1873) 23 Oh. St. 146, 165; cf. *Redd v. State* (1881) 68 Ala. 492, 496. Of the two general views exemplified by the principal cases, the latter, recognizing independent relevancy, would appear to be superior. The former, which operates to exclude much relevant and enlightening evidence, has been charged with producing undesirable results and otherwise vigorously criticised. See Professor Wigmore (1917) 11 ILL. L. REV. 573.

M. B.

EVIDENCE—RES GESTAE—STATEMENT BY ATTORNEY.—SCHANZENBACH V. STOLLER (1917) 161 N. W. (S. D.) 329.—In a suit for breach of contract to save himself harmless from the effects of a mortgage, the plaintiff sought to put in evidence a statement by his attorney to the offeror that the plaintiff would accept the terms of the offer, only if the appellants should act as co-guarantors with the offeror in saving him harmless. *Held,* that the testimony was admissible because it was not hearsay, but part of the *res gestae.* Whiting, J., *dissenting.*

The testimony clearly seems to be hearsay in that it was an extra-judicial statement, and the hearsay rule excluding it applies, since the evidence is for the purpose of proving testimonially the truth of the statement. Greenleaf, *Evidence* (16th ed.) sec. 100. The court cites a single authority to explain the admissibility of the evidence; namely, Wigmore, *Evidence,* secs. 1770, 1772, and 1777. The sections referred to are concerned with utterances constituting a verbal part of the act. As shown by Whiting, J., these sections are not in the least applicable to the present case, nor do they uphold the view advanced by the court. The statement in the instant case was not made by the plaintiff nor did it accompany any act of his. This is essential to its admission on the grounds set forth by the court. *Ford v. Haskell* (1865) 32 Conn. 489. Nor does the evidence meet another requirement necessary to admit it as an utterance constituting a verbal part of the act; namely, that it must be independently material to the issues of the case. *Patten v. Ferguson* (1847) 18 N. H. 528.

F. L. McC.

GIFTS—DONATIO CAUSA MORTIS—NECESSITY OF PROVING THE CAUSE OF DEATH.—STEVENS V. PROVIDENT INST. FOR SAVINGS (1917) 115 N. E. (MASS.) 404.—The test of the validity of gifts *causa mortis* is not the resultant death from the apprehended disease, but rather the fact that there had been no recovery from that disease, whether or not death was actually caused thereby.

A *donatio causa mortis* is a gift, absolute in form, made by the donor in anticipation of his speedy death. To make such a gift effective it is

essential that it should be made in reasonable expectation of death. *Barstow v. Tetlow* (1916) 115 Me. 96; *Northrip v. Burge* (1914) 255 Mo. 641. Story declares that the validity of the gift is conditional upon the death of the donor as a result of his existing illness. Story, *Equity Jurisprudence,* Vol. I, sec. 607a. After this follow dicta in numerous cases that death must result from that very illness. *Robson v. Robson Adm'r* (1866) 3 Del. Ch. 51; *Dickeschied v. Bank* (1886) 28 W. Va. 340; *In re Elliott's Estate* (1913) 159 Ia. 107. In one case where the party was taken to a hospital suffering from a disease, and death resulted three months later, recovery was denied on the ground that it was not proved that the same disorder caused the death. *Conser. v. Snowden* (1880) 54 Md. 175. On the other hand, a man who successfully underwent an operation for a hernia, but who finally died some weeks later of heart failure was held to have made a valid *donatio causa mortis. Ridden v. Thrall* (1891) 125 N. Y. 572. This court declares that it is not necessary that the patient should have died of the same disease, and that it is sufficient if the donor does not recover from the disease from which he then apprehended death. In the principal case, the decision is not rested upon this ground alone, but the court found evidence from which to infer that the woman died as a result of the disease from which she was suffering four months previously.

J. E. H.

LANDLORD AND TENANT—OPTION TO PURCHASE—CONDITION PRECEDENT TO LESSOR'S DUTY TO CONVEY.—COOK V. HOUGHTON (1917) 100 ATL. (VT.) 115.—The defendant leased land to the plaintiff and covenanted that the plaintiff should be entitled to a deed of the premises at the expiration of the term, provided he should at that time pay to the defendant a stipulated amount. Before the expiration of the term the defendant brought an action of ejectment against the plaintiff, and pending trial the plaintiff had to give a bond for bail. This prevented him from tendering payment at the expiration of the lease. The plaintiff later won the ejectment suit, and now brings a bill for the enforcement of his option. *Held,* that the plaintiff's failure to tender payment at the time specified did not deprive him of his rights under the option agreement.

Inequitable or fraudulent conduct by which one party to a contract makes it impossible for the other to perform a condition precedent to the first party's liability is usually treated as a waiver of the condition. *Batterbury v. Vyse* (1863) 2 H. & C. 42. Upon this ground the conclusion reached in the principal case was undoubtedly correct. But the court went further and endeavored to justify their decision upon other grounds, saying: "Equity does not consider the mere fixing of a definite date for performance as making time of the essence of the contract"; and intimated that even apart from the inequitable conduct of the defendant, the plaintiff would have prevailed. In many cases the courts have applied this doctrine with the result that they have disregarded the nonfulfilment of an express condition precedent consisting of payment or notice, to be made or given at a particular date. *Barnard v. Lee* (1868) 97 Mass. 94; *Jones v. Robbins* (1849) 29 Me. 351; *Parlin v. Thorald*